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CHARLES F. WILSON, JR.

No. 163

In the Supreme Court of the United States

OCTOBER TERM, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LAIRD WILCOX AND MAUD WILCOX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

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(1)

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The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, reversing the decision of the Tax Court in this case.

OPINIONS BELOW

The opinion of the Tax Court (R. 16-20) is unreported. The opinion of the circuit court of appeals (R. 30-33) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 30, 1945 (R. 33-34). The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does embezzled money constitute taxable income to the embezzler under the broad provision of Section 22 (a) of the Internal Revenue Code?

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C., Sec. 22.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.22 (a)-1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent,

dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *

STATEMENT

The facts as stipulated (R. 9-13) and as so found by the Tax Court (R. 16) are the following:

The taxpayer, Laird Wilcox, was employed as a bookkeeper of the Nevada Transfer and Warehouse Company from 1937 to 1942 (R. 16-17). During the year 1941 he converted to his own use \$12,748.60 of his employer's funds, composed of miscellaneous sums of money received and collected by him at different times in his capacity as bookkeeper (R. 17). He lost practically all of the money taken in gambling houses in Reno, Nevada (R. 18). The company always paid the taxpayer's salary promptly, never permitted him to make advance withdrawals, and was never indebted to him except for salary (R. 17). It did not consent to the secret appropriations and did not discover them until June, 1942, when an audit was made of the taxpayer's books (R. 17). It never forgave or condoned the taking of the money and still holds the taxpayer liable to restore it (R. 18). On July 20, 1942, the taxpayer was arraigned in a state court in Nevada for the

crime of embezzling a total of \$22,896.01, entered a plea of guilty as charged, and was sentenced to not less than two or more than fourteen years of imprisonment (R. 17, 18). He was paroled in the middle of December, 1943 (R. 18). The Commissioner determined that the taxpayer was required to report the \$12,748.60 embezzled as income for the year 1941 (R. 9). The Tax Court sustained the Commissioner (R. 20). The court below reversed the decision of the Tax Court (R. 33).

SPECIFICATION OF ERROR TO BE URGED

The circuit court of appeals erred in holding that the embezzled moneys did not constitute taxable gains or profits or income within the meaning of Section 22 (a) of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

The decision of the court below is in direct conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *Kurrie v. Helvering*, 126 F. 2d 722, although in accord with *McKnight v. Commissioner*, 127 F. 2d 572 (C. C. A. 5). The difference between the courts stems from varying interpretations of the scope of *North American Oil v. Burnet*, 286 U. S. 417. In that case a receiver held property pending litigation between the United States and the North American company as to its beneficial ownership. Income earned by the property in 1916 was turned over by the receiver to the company in 1917 upon entry

of a final decree in the district court dismissing the bill of the United States. The appellate phases of the litigation were finally terminated in 1922. The question was whether the income should have been reported by the company in 1916, 1917 or 1922. This Court held that the company was not required to report in 1916 an amount which it might never receive. In holding the income taxable in the year 1917 rather than in 1922, the Court said (p. 424):

If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.

This language was relied upon by the court below in the instant case (R. 32) as establishing that money taken from an employer without claim of right—as in an outright embezzlement—does not constitute income to the taker. In so applying the language to the facts of this case, we believe that the court committed plain error. In the *North American Oil* case this Court was not concerned with the taxability of funds received without claim of right, and there is no reason to suppose that the language used was intended to mark the outermost limits of the concept of income. Cf. *Helvering v. Clifford*, 309 U. S. 331, 334.

The Tax Court has consistently (R. 20) held such receipts to be taxable income. See, also, G. C. M. 16572, XV-1 Cum. Bull. 82 (1936), ruling that the proceeds of an embezzlement constitute taxable income.

CONCLUSION

While the taxability of embezzled funds is not in its nature one of the major problems of tax administration, the question presented is one of general application on which the circuits are in conflict, and the decision below is contrary to the settled administrative construction and to the settled view of the Tax Court. Since administrative confusion will be unavoidable until the conflict is resolved, it is respectfully submitted that this petition should be granted.

CHARLES FAHY,
Solicitor General.

JUNE 1945.

¹ See, also, G. C. M. 16730, XV-1 Cum. Bull. 179, likewise issued in 1936, and adhering to the doctrine of "claim of right" in regard to legally disputed funds.